Supreme Court, U.S.
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No. 03-980

In The Supreme Court of the United States

JENNIFER MCKEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the court of appeals commit error by allowing a constructive amendment of the indictment or a variance which caused Jennifer McKee substantial prejudice by allowing the admission of evidence relating to the BWRI Water Account?

2. Did the redacted confession of codefendant, Brian McKee, point directly to Jennifer McKee and, therefore, facially incriminate her in violation of *Bruton v. United States*, 391 U.S. 123 (1968); *Richardson v. Marsh*, 481 U.S. 200 (1987); and *Gray v. Maryland*, 523 U.S. 185 (1998)?

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The published Opinion of the Eleventh Circuit Court of Appeals, *United States v. Williamson*, 339 F.3d 1295 (11th Cir. 2003), affirming the Defendants' convictions is set forth in the Appendix at A-1. The Order of the Eleventh Circuit Denying Defendants' Petition for Rehearing and Petition(s) for Rehearing En Banc is set forth in the Appendix at A-28. The Order of the Court of Appeals granting a stay of the Mandate to File a Petition for Writ of Certiorari, dated October 21, 2003, is set forth in the Appendix at A-30.

STATEMENT OF JURISDICTION

On July 30, 2003, the United States Court of Appeals for the Eleventh Circuit issued an Opinion affirming the conviction of the Petitioner, Jennifer McKee, and the 15-month sentence imposed by the United States District Court for the

Middle District of Alabama.

The Petitioner's application for rehearing and rehearing en banc was denied by the court on October 3, 2003. On October 21, 2003, the court of appeals entered an Order staying their mandate to allow the Petitioner to proceed with her Petition for Writ of Certiorari to the Supreme Court.

Jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254(1), which provides in part that "cases in the Court of Appeals may be reviewed by the Supreme Court by Petition for Writ of Certiorari."

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> **Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property**
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> **Amendment VI. Jury Trials for Crimes, and Procedural Rights**
>
> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]

STATEMENT OF THE CASE

Proceedings Below

The United States charged Jennifer McKee with one count of conspiracy to commit mail fraud in violation of 18 U.S.C. § 371, and 18 counts of mail fraud in violation of 18 U.S.C. § 1341. Jennifer McKee's three codefendants were charged in a 31-count indictment alleging conspiracy to commit mail fraud in violation of 18 U.S.C. § 371, mail fraud (Counts 2-18) in violation of 18 U.S.C. § 1341, conspiracy to commit money laundering (Count 19) in violation of 18 U.S.C. § 1956(h), and money laundering (Counts 20-31) in violation of 18 U.S.C. § 1956(a)(1)(A). (R4-1-1.)

All appellants proceeded to trial in a joint trial. On January 22, 2002, Brian McKee, Dwight Faulk, and Linda Williamson were found guilty on all counts. (R4-261-1.) Jennifer McKee was found guilty only of conspiracy to commit mail fraud as set out in Count 1.

On May 3, 2002, the district court sentenced Jennifer McKee to 15 months' imprisonment. (R5-331-1; R28-241 through -245.) Notice of appeal was timely filed on May 13, 2002.

An appeal was taken to the United States Court of Appeals for the Eleventh Circuit on May 13, 2002. Following oral argument, a divided panel of the Eleventh Circuit affirmed her conviction and sentence on July 30, 2003. (A-1.) The Petitioner's application for rehearing and rehearing en banc was denied by the court of appeals on October 3, 2003. (A-28.) This Petition for Writ of Certiorari followed. Jennifer McKee *has not* been incarcerated during the pendency of said appeals.

Statement of Facts

The Etowah Solid Waste Disposal Authority (hereinafter referred to as "ESWDA" or "the Authority") operated a solid waste transfer station and a C&D landfill near Gadsden, Alabama. The transfer station received and processed household garbage for transfer and ultimate disposal at a distant location. The landfill also received construction material commonly referred to as "construction and demolition" materials (hereinafter referred to as "C&D").

The Authority was created by a special act of the Alabama Legislature; however, it receives no state, federal, or local funds.

The Authority was in dire financial condition. At the end of 1994, the Authority was operating in the red in the approximate amount of $778,000. (R. 23-192.) As a result of the need for additional revenue, Brian McKee approached various members of the Authority's board to suggest inducements or ways to attract additional customers to use ESWDA's C&D landfill, thereby generating additional revenue.

Terry Wofford was the Superintendent of ESWDA; Brian McKee, Jennifer McKee's husband, was the Administrator for the Authority. (R. 16-10.) On March 9, 1995, the Authority passed a resolution which allowed any recycling company doing business in Etowah County to receive a 50% discount from the dumping fees for C&D materials disposed of in the Authority's landfill. (Gov. Ex. 6A.)

On March 16, 1995, Big Wheel Recycling, Inc. (hereinafter referred to as "BWRI"), was incorporated as an Alabama corporation.

Subsequent resolutions passed by the Authority on August 15, 1995 and August 12, 1997 allowed the municipal rate of $17.50 per ton to commercial haulers that dumped a specified tonnage in the landfill. (Gov. Exs. 6B, 9.)

Once incorporated, BWRI began to pick up C&D material at various mobile home manufacturers in an adjoining county and dump it in the Authority's landfill.

The conspiracy (Count 1) is alleged to have existed from 1995 through February 2000. Count 1 of the indictment alleges that "it was the object of the conspiracy to obtain lower rates for Big Wheel Recycling, Inc. (BWRI), to dump waste at the landfill of the Etowah Solid Waste Disposal Authority (ESWDA) in order for BWRI to make substantial profits from its contracts with various mobile home manufacturers to pick up and dump the waste of the manufacturers." Jennifer McKee had no contact with any of the mobile home manufacturers, their waste stream, or billing. (R. 18-185; R. 24-36.)

Paragraph 2 of Count 1 sets forth the manner and means of the conspiracy and scheme to defraud. It reads in pertinent part: "commit the offense of mail fraud against the United States, in violation of Title 18 U.S.C. § 1341, *by falsely representing to ESWDA that BWRI was entitled to a dumping fee rate of $8.75 per ton, when in truth and in fact, as the defendants then and there well knew, BWRI was not entitled to the rate.*"

Jennifer McKee took no action to appear before the ESWDA to negotiate rates or to obtain a lower rate for BWRI. (R. 16-86; R. 16-184, -185; R. 18-8; R. 20-103; R. 24-32, -33.) No investigator who interviewed Jennifer McKee asked her if she knew that the rate charged by the Authority to BWRI was $8.75 per ton. (R. 20-202; R. 24-34.) In fact, Jennifer McKee did not know that BWRI's rate was $8.75 per ton. (R. 24-33.)

Paragraph 3 of Count 1 states that it was, further, a part of the conspiracy and scheme to defraud that the defendants knowingly and willfully caused to be mailed, by the United States Postal Service, statements and weight tickets from ESWDA to BWRI, statements from BWRI to mobile home manufacturers, payments from mobile home manufacturers to BWRI, and payments from BWRI to ESWDA.

Jennifer McKee did not mail or cause to be mailed statements or weight tickets from ESWDA to BWRI. (R. 18-10; R. 24-35, -36.) Jennifer McKee did not mail any invoice or request for payment from ESWDA to BWRI. The United States stipulated that the Authority's documents were mailed by Frost Printing, who had a subcontract with SanSonic. (R. 16-69; R. 18-10; R. 24-35, -36.) Jennifer McKee did not mail any check from BWRI to ESWDA for deposit. (R. 24-36, -37.) Barbara Abel, Chief Clerk of ESWDA, prepared the invoices and mailed them to BWRI. (R. 16-191; R. 18-10.) Abel also prepared and mailed bills to Chandeleur Homes, Autumn Homes, Homes of Legends, and other manufacturers, but no bills went to the mobile homemakers—they were all sent to BWRI's address in Letohatchee, Alabama. (R. 18-10; R. 24-36.)

In the predicate paragraphs to Count 1, paragraph 10 alleges in part, " BWRI did not carry out recycling of materials prior to dumping at the landfill and maintained only a sham office in Etowah County at the home of McKee." Finally, paragraph 16 of the indictment states, "Jennifer McKee, wife of McKee, received payments from BWRI totaling $69,291.66.

"McKee did not have authority to write checks on BWRI's checking account" (United States stipulates (R. 15-84; R. 24-18).) Significantly, Jennifer McKee took no part in the administration of the Authority or its billing practices. (R. 24-37.) Until this case commenced, Jennifer McKee had never seen a weight ticket. (R. 24-38.) When BWRI commenced operations in Etowah County, BWRI purchased city and

county licenses immediately and each year thereafter. In lieu of renting office space downtown, BWRI used a portion of Jennifer McKee's home as a local office. Jennifer McKee set up telephone service in the name of BWRI, advertised in the Yellow Pages, coordinated paper drives, and assisted in paper and cardboard collection from commercial sites in the spring and summer of 1995. (R. 23-251 through -257.) Eddie Campbell ran a second route for BWRI picking up cardboard from Covan Moving & Storage. (R. 23-324.) By early fall 1995, paper and cardboard prices got so low that no one would purchase the cardboard, and the routes had to be abandoned.

To further dispel the Government's sham office contention, Jennifer McKee testified that during the period of the indictment she called on several businesses to get new business and set up new accounts with Dollar General Store in Leesburg, Dollar General Store in Center, Dawson Construction Company, Crown Columns, Herbert Construction Company, Gibbs Contracting, Graham Collins, Keith Blackwell, and Jack Graves. (R. 24-20.) Eddie Campbell, Superintendent of the Cherokee County Landfill, corroborated Jennifer McKee's testimony by testifying that he referred customers to Jennifer McKee on 10 to 15 occasions. (R. 23-328.)

Finally, the indictment in paragraph 16 sets forth that Jennifer McKee received payments from BWRI totaling $69,291.66. In the opening statement on two occasions, AUSA Verne Speir affirmed that the payments were $69,291.66 over a five-year period. At trial and over objection, the United States was permitted to introduce evidence of payments from the BWRI Water Account, which brought the total to $85,859 for the five-year period. (R. 20-212, -229.) Throughout trial, the defense maintained that the introduction of the BWRI Water Account constituted multiple error and prejudiced Jennifer McKee both at trial on the merits and at sentencing.

Over objection, the United States was allowed to introduce Brian McKee's postconspiratorial statement to law enforcement officers which violates the teaching of *Bruton v. United States.* Special Agent Keith Baker was permitted to testify that Brian McKee brought forward the resolution to allow recyclers to get a discounted rate at the ESWDA and that he (McKee) was being paid because of his having gotten the recycling resolution passed and for giving BWRI the discounted rate of $8.75 per ton for dumping debris at the ESWDA. Brian McKee also told the agents that he knew what he was doing was illegal. Prior to the introduction of the Bruton statements, the Government and the Court observed that "the only person who is in a position to claim about this is the wife." (R. 20-13.)

REASONS FOR GRANTING THE WRIT

I. BY ALLOWING THE ADMISSION OF EVIDENCE RELATING TO THE BWRI WATER ACCOUNT, THE TRIAL COURT ALLOWED A CONSTRUCTIVE AMENDMENT OF THE INDICTMENT OR A VARIANCE WHICH CAUSED JENNIFER MCKEE'S SUBSTANTIAL PREJUDICE.

The admission of the evidence relating to the BWRI Water Account permitted Jennifer McKee to be tried on charges that were not made in the indictment against her. "It is well established 'that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him.' When the evidence at trial or the court's jury instructions deviate from what is alleged in the indictment, two distinct problems can arise—constructive amendment or variance. The distinction between the two terms is important because constructive amendment of the indictment is per se reversible error. A variance, on the other hand, requires reversal only when the defendant can establish that his rights

were substantially prejudiced thereby." *United States v. Flynt*, 15 F.3d 1002, 1005 (11th Cir. 1994) (internal citations omitted). Jennifer McKee argues that the admission of the BWRI Water Account evidence constituted a constructive amendment of the indictment which constituted per se reversible error. In the alternative, Jennifer McKee argues that the admission of the BWRI Water Account evidence constituted a material variance which caused her substantial prejudice.

In arguing that there was neither a constructive amendment of the indictment nor a material variance, the Government relies on *United States v. Flynt*. In that case, the indictment stated that Donald Hart owned Fast Freight, Inc., and that the defendant violated federal law in a way that injured Donald Hart. *Id.* at 1005. On appeal, the defendant argued that the proof at trial demonstrated that the victim was not Donald Hart but, rather, Fast Freight, Inc. *Id.* The Government introduced checks over defendant's objection at trial showing that Fast Freight, Inc., was the victim, and the defendant argued that this constituted a constructive amendment of the indictment. *Id.* at 1006. The court held that evidence of the difference in the victim did not constitute a constructive amendment of the indictment, but it did find that it did constitute a variance. *Id.* at 1007. This variance between the allegations of the indictment and the proof at trial was deemed not to be prejudicial in the *Flynt* case because the Government's response to the defendant's request for a bill of particulars made it clear that it intended to prove Hart's victimization through his ownership interest in the company, and consequently there was no unfair surprise. *Id.* at 1006-07.

To the contrary, *Flynt* supports Jennifer McKee's contention that the introduction of the BWRI Water Account checks, which were not mentioned in the indictment and which increased the amount of money she was alleged to have received from that amount stated in the indictment, constituted a material variance. Moreover, because the

Government failed to disclose this evidence at any point prior to the presentation of evidence at trial, including when it was given an opportunity to do so in response to Jennifer McKee's request for a bill of particulars, vividly demonstrates that this variance was substantially prejudicial. *Id.* at 1006-07.

Additionally, Jennifer McKee contends that the actual difference between the indictment and proof in her case was far more serious than that involved in *Flynt* and constituted a constructive amendment. The proof regarding the BWRI Water Account, which involved payments of a larger amount relating to a different landfill, in a different location, for services of a different nature, broadened the possible basis for conviction beyond those in the indictment. *See, e.g., Stirone v. United States*, 361 U.S. 212, 215-17 (1960).

II. THE ADMISSION OF THE REDACTED STATEMENT OF BRIAN MCKEE POINTS DIRECTLY TO JENNIFER MCKEE AND THEREFORE FACIALLY INCRIMINATES HER IN VIOLATION OF *BRUTON, RICHARDSON,* AND *GRAY.*

The district court erred when it allowed the inculpatory pretrial statements of Brian McKee to be admitted because the testimony regarding his confession compelled a direct implication of Jennifer McKee in violation of the constitutional protections recognized in *Bruton v. United States*, 391 U.S. 123, 126 (1968); *Richardson v. Marsh*, 481 U.S. 200 (1987); and *Gray v. Maryland*, 523 U.S. 185 (1998). The admission of Brian McKee's pretrial statement that he was being paid for getting the recycling resolution passed and for giving BWRI a discounted rate and that he knew what he was doing was illegal (R. 20-154, -155), and the admission of Brian McKee's pretrial statement that "the money that came through Jennifer was his" (R. 20-171 (emphasis added)) directly implicated his wife, Jennifer McKee, and exposed her to a

"substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining [her] guilt" and thereby "violated [her] right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." *See Bruton*, 391 U.S. at 126.

The Government cannot and has not explained how it can possibly argue that Brian McKee's statements, which identify his wife Jennifer by name and tie her to his admitted criminal conduct, fail to constitute a *Bruton* violation. The Panel Opinion finds that McKee's pretrial statement directly links Jennifer McKee. The Panel's conclusion that a favorable answer by the case agent effectively eliminated the prejudice is misplaced. The Government concedes that one of the key elements for a finding that no *Bruton* violation has occurred is that the confession has been redacted to eliminate reference to the defendant. (Gov. Br. at 15.) Clearly, Brian McKee's statement that the money, which he characterized as payment for illegal acts, that came through Jennifer was his, is a statement which directly inculpates Jennifer McKee in the receipt of a payoff for his illegal acts.

Given the absolute absence of any other evidence from which a reasonable jury could find that Jennifer McKee had committed any criminal acts or had any criminal intent is evidence that Brian McKee's statements constituted the only evidence on which the Government's case against Jennifer McKee is hung. Accordingly, a *Bruton* violation occurred when Brian McKee's facially incriminating statements about his wife were admitted, and this error cannot be said to be harmless. *See United States v. Doherty*, 233 F.3d 1275, 1281-83 (11th Cir. 2000). The Eleventh Circuit's decision in *Doherty* is extremely instructive because, like this case, the nontestifying codefendant admitted that he knew that what he was doing was illegal and that the appellant, who was identified by name, was involved and linked to "the transactions at issue." *Id.* at 1280-82. Moreover, the prejudicial effect of the

challenged statement is significant and unconstitutional, despite the limiting instructions given by the trial court, because of the absence of other direct evidence that the appellant "knew that [she] was participating in a [criminal] conspiracy." *See, e.g., Bruton*, 391 U.S. at 126; *Doherty*, 233 F.3d at 1282. This error was devastating and infected the record with reversible error. *See, e.g., Doherty*, 233 F.3d at 1282; *United States v. Gonzalez*, 183 F.3d 1315, 1321-23 (11th Cir. 1999), *cert. denied*, 528 U.S. 1144 (2000) (admission of confession in violation of *Bruton* was not harmless error and defendants were entitled to new trials); *United States v. Beale*, 921 F.2d 1412, 1424-25 (11th Cir.), *cert. denied*, 502 U.S. 829 (1991) (*Bruton* violation did not constitute harmless error because the statement in violation of *Bruton* was the only evidence of the defendant's involvement in the conspiracy and the effect of the statement was not "so insignificant that it is clear beyond a reasonable doubt that the improper use of [the] statement is harmless error"; thus a new trial is warranted). The error is compounded where, as here, the statement is made by a defendant's spouse about his own knowledge and intent because, given the familial relationship, a jury is more inclined to improperly impute Brian McKee's knowledge and intent to Jennifer McKee.

CONCLUSION

Based upon the foregoing argument and citations of authority, the Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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No. _____

In The Supreme Court of the United States

JENNIFER MCKEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

APPENDIX

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LINDA WILLIAMSON, A.K.A. LINDA WEST,
DWIGHT FAULK, et al.,
Defendants-Appellants.

No. 02-12765.

United States Court of Appeals,
Eleventh Circuit.

July 30, 2003.

Defendants were convicted of conspiracy to commit mail fraud, mail fraud, conspiracy to commit money laundering, and money laundering by the United States District Court for the Middle District of Alabama, No. 01-00106-CR-N, Myron H. Thompson, J., and they appealed. The Court of Appeals held that: (1) evidence that administrator for solid waste disposal authority, knowing that company for which his wife worked was not recycling company, had conspired with company's principals, in return for kickbacks routed through his wife, to give company a discounted rate available only to recyclers for waste that it dumped at landfill, was sufficient to support mail fraud and conspiracy to commit mail fraud convictions; (2) evidence that defendants had deposited and cashed checks which represented the proceeds of their mail fraud conspiracy was sufficient to sustain conviction for promotional money laundering; and (3) post-arrest statement made by administrator, acknowledging that he had been paid for arranging for company to receive this special rate, did not facially implicate his alleged co-conspirators as parties making payments and did not violate co-conspirators' *Bruton*

confrontation rights.

Affirmed.

Dowd, District Judge, sitting by designation, concurred in part and dissented in part and filed opinion.

Gregory M. Biggs, Montgomery, AL, George L. Beck, Jr., Beck & Byrne, P.C., David B. Byrne, Jr., Capell & Howard, Montgomery, AL, John D. Floyd, Jack Floyd, Floyd, Floyd & Floyd, Gadsden, AL, for Defendants-Appellants.

Verne H. Speirs, Montgomery, AL, for Plaintiff-Appellee.

Appeals from the United States District Court for the Middle District of Alabama.

Before DUBINA and FAY, Circuit Judges, and DOWD,* District Judge.

PER CURIAM:

On June 27, 2001, a federal grand jury returned a thirty-one count indictment against Defendants-Appellants Dwight Faulk ("Faulk"), Linda Williamson ("Williamson"), and Brian and Jennifer McKee for conspiracy to commit mail fraud in violation of 18 U.S.C. § 371 (Count 1), mail fraud in violation of 18 U.S.C. § 1341 (Counts 2-18), conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h) (Count 19), and money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(I) (Counts 20-31). Following a joint jury trial, Faulk, Williamson and Brian McKee were found guilty on all

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*Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

charges. Jennifer McKee was found guilty for violation of 18 U.S.C. § 371, conspiracy to commit mail fraud. The Appellants timely appealed their convictions.

In this appeal, the Appellants challenge the sufficiency of the evidence against them, and challenge the District Court's admission of non-testifying codefendant Brian McKee's inculpatory statements to law enforcement personnel pursuant to *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).[1] After consideration of the parties' briefs and oral argument as well as an independent review of the entire record of trial, we conclude that there exists a sufficient legal basis for a reasonable jury to have convicted the Appellants, and that the district court did not err in admitting Brian McKee's statements.

I. BACKGROUND

The Etowah Solid Waste Disposal Authority ("ESWDA") was established by the Etowah County Commission in September 1993 for the purpose of operating an inert landfill in Etowah County, Alabama. The ESWDA consisted of a five-member Board of Directors tasked by the Etowah County Commission with the responsibility of overseeing the operation of the landfill.

Because the Etowah County landfill did not meet certain federal and state guidelines, it only accepted disposal of non-putrescible waste such as construction and demolition ("C&D") materials and other inert, non-hazardous items.

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[1]The Appellants raise a host of additional issues for our consideration. Based on a thorough review of the record and consideration of oral argument, we find those issues to be without merit and, therefore, affirm the district court without extended analysis.

Putrescible waste such as household garbage was diverted from the Etowah County landfill to an Etowah County transfer station where, at considerable expense to the ESWDA, it was hauled to an adjacent county for disposal in a landfill that met the pertinent guidelines.

As it turns out, the Etowah County landfill was an extremely profitable venture for the ESWDA. However, the ESWDA was losing significant revenue through the transfer station as a result of having to separate and haul putrescible waste. Accordingly, the ESWDA sought to reduce the amount of putrescible waste entering the transfer station and to maximize the non-putrescible waste entering the Etowah County landfill. To meet this objective, in March 1995, the ESWDA passed two resolutions drafted and presented by Brian McKee, the Solid Waste Administrator for the ESWDA. The first resolution provided for a fifty percent reduction in the dumping fee at the Etowah County landfill to recycling companies located in Etowah County.[2] The second resolution allowed commercial haulers to take advantage of the lower municipal rate provided that a minimum of 2,750 tons of waste were disposed of per month and that the hauler's account with the ESWDA was not past due. In August 1995, Brian McKee introduced and the ESWDA passed a third resolution which altered the 2,570 tons per month requirement for a commercial hauler to receive the municipal dumping

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[2]At the time of the passage of the first resolution, commercial haulers of waste were required to pay a dumping fee of $20.00 per ton for use of the Etowah County landfill. The $20.00 per ton commercial dumping rate was in effect until September 1995, at which time the rate increased to $25.50 per ton. In addition to the commercial hauler rate, there existed a special municipal rate of $17.50 per ton. The municipal rate was also in effect at the time of the passage of the first resolution and at all times pertinent to this case.

rate. The new dumping requirement for a commercial hauler to qualify for the municipal rate was 100 tons per day. Finally, in August 1997 a fourth resolution was passed by the ESWDA concerning the minimum required dumping amount enabling a commercial hauler to qualify for the municipal rate. The fourth resolution provided that a commercial hauler was entitled to receive the municipal rate if 500 tons of C&D waste were dumped.[3]

Seven days following the passage of the first two resolutions, Faulk, Probate Judge of Crenshaw County, Alabama and Williamson, County Administrator for Crenshaw County, Alabama formed a company called Big Wheel Recycling, Inc. ("BWRI").[4] BWRI was formed by Faulk and Williamson in an attempt to take advantage of the discounted dumping rate available to commercial recycling companies located in Etowah County.[5] To this end, Faulk entered into contracts with four mobile home manufacturers located in Marshall County, Alabama to haul their C&D

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[3]The resolution did not specify the time period over which the minimum dumping requirement must be met in order to qualify for the municipal rate. However, witnesses testified and the Government all but conceded at trial that the 500 ton requirement was monthly.

[4]Williamson owned 998 of the outstanding 1000 shares of BWRI's stock and served as President of the corporation. Faulk was the Chief Executive Officer of BWRI and controlled the day-to-day activities of the corporation.

[5]The Government alleges that BWRI was formed as part of the conspiracy that existed between the Appellants wherein they sought to impermissibly receive discounted dumping rates at the Etowah County landfill through the assistance of Brian McKee.

waste. Because of the discounted dumping rate at the Etowah County landfill, Faulk could offer the mobile home manufacturers significantly reduced hauling rates for their C&D waste and still earn a substantial profit for BWRI. In order to qualify for the discounted dumping rate, however, BWRI would have to meet certain criteria. Yet, as the Government alleges, BWRI knowing and fraudulently received an $8.75[6] per ton dumping rate despite not meeting the criteria as established through the various ESWDA resolutions.

II. DISCUSSION

A. Sufficiency of the Evidence

The Government contends that the Appellants engaged in an elaborate scheme to defraud the ESWDA through a pattern of mail fraud and money laundering in order to impermissibly take advantage of the $8.75 per ton discounted dumping rate available at the Etowah County landfill. Simply explained, the Government contends that Brian McKee directed employees of the ESWDA to give BWRI an $8.75 per ton dumping rate knowing that BWRI was not a recycling company located in Etowah County nor had met the minimum dumping requirements. As payoff for knowingly and impermissibly being given the $8.75 per ton dumping rate, according to the Government, BWRI would funnel profits earned from the four mobile home manufacturers back to Brian McKee through his wife Jennifer, an employee of BWRI who ran an office for BWRI out of her Etowah County home. In total, the Government contends that BWRI defrauded the ESWDA of approximately $1.4 million.

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[6]The $8.75 per ton rate is the result of a fifty percent discount from the municipal rate of $17.50.

Appellants contend that there is insufficient evidence to sustain their convictions for mail fraud and conspiracy to commit mail fraud. Appellants' contention that there is insufficient evidence to sustain their convictions is an issue we decide *de novo*. *United States v. Miles*, 290 F.3d 1341, 1355 (11th Cir.2002). We review the evidence to determine whether "a reasonable jury, viewing the evidence and all reasonable inferences therefrom in the light most favorable to the Government could find the defendants guilty as charged beyond a reasonable doubt." *United States v. Navarro-Ordas*, 770 F.2d 959, 966 (11th Cir.1985) (internal citations omitted). A jury's verdict will be affirmed if the court determines that a "jury was rationally able to find that every element of the charged crimes was established by the Government beyond a reasonable doubt." *See United States v. McCarrick*, 294 F.3d 1286, 1289-90 (11th Cir.2002).

1. Mail Fraud

The Government presented evidence that could lead a reasonable jury to conclude that the Appellants knowingly and willfully defrauded the ESWDA by receiving a discounted dumping rate of $8.75 per ton to which BWRI was not entitled. Whether BWRI was entitled to an $8.75 per ton dumping rate, at the most basic level and as was hotly litigated at trial, concerns whether BWRI was a recycling company located in Etowah County.[7]

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[7]Appellants concede that BWRI never met the minimum dumping requirements needed to qualify for the municipal rate. The evidence further demonstrates that BWRI's account with the ESWDA was not paid and up-to-date. Appellants argue, however, that the first resolution is independent of the other resolutions and, although silent on this point, is intended to give a fifty percent discount from the municipal rate to those recycling companies

The Appellants argue that BWRI was a recycling company because it engaged in what they term "source separation" which, as described by the Appellants, entails providing the means for separation and segregation of putrescible waste from non-putrescible waste. Appellants presented evidence at trial from both experts and lay witnesses which they argue proves that BWRI was engaged in source separation and that source separation is part of the recycling process. On this point, the evidence at trial shows that BWRI provided large trash containers known as pans to the various mobile home manufacturers so that the putrescible waste of the manufacturers could be disposed of separately from the non-putrescible waste. Thereafter, BWRI would pick up the pans of non-putrescible waste and haul them to the Etowah County landfill for dumping. The putrescible household garbage would also be picked up by BWRI, however, such waste was directed to a proper dump site.

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located in Etowah County. In opposition, the Government argues that the first resolution simply grants a fifty percent reduction from whichever rate would ordinarily apply and that in order to qualify for the $8.75 per ton rate, BWRI would have to be a recycling company located in Etowah County that had an up-to-date account with the ESWDA and met the minimum per month dumping requirement. While we need not resolve this issue, suffice it to say, a reasonable jury, based on all the evidence, could conclude that absent meeting the minimum dumping requirements and having an up-to-date account with the ESWDA, at best, a commercial recycling company located in Etowah County would qualify for a fifty percent discount from the commercial rate rather than from the municipal rate. Furthermore, BWRI's repeated failure to meet such criteria despite receiving the $8.75 per ton dumping rate is circumstantial evidence of the Appellants' intent to defraud the ESWDA and provides further support for the jury's verdict.

Thus, as Appellants argue, source separation is certainly the beginning of the recycling process.

The Government presented evidence at trial showing that outside of the limited cardboard recycling that occurred in 1995, BWRI did not act as a recycling company. The Government argued at trial and now argues on appeal that BWRI is, in reality, nothing more than a regular commercial hauler of waste. Evidence in support of this position shows that the non-putrescible waste removed from the mobile home manufacturer facilities was simply transported to and dumped at the Etowah County landfill where it was covered in dirt.[8] Thus, as the Government contends and as the evidence demonstrates, the non-putrescible waste hauled by BWRI was not part of the recycling process because it was not destined for a recycling facility nor was it being recycled by BWRI. We conclude, therefore, that although "source separation" may begin the recycling process in some instances, a reasonable jury could conclude that BWRI was not recycling because it simply transported the non-putrescible waste from the mobile home manufacturers to the Etowah County landfill to be dumped without hope of ever being recycled for further use.[9]

In further support of their position, Appellants argue

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[8]Walter Nichols, a defense recycling expert, even testified that simply hauling non-putrescible waste to be dumped with no further expectation of that waste being converted and put to use is not recycling. This conclusion was supported by the Government's recycling experts.

[9]The Government showed that on many occasions putrescible waste from the mobile home manufacturers was not separated from the non- putrescible waste. Thus, on those occasions, BWRI was illegally dumping putrescible waste at the Etowah County landfill.

that the evidence presented at trial shows that upon dumping of the non-putrescible waste at the Etowah County landfill, BWRI employees would sift through the rubble and would remove useable items such as carpet, wood, salvageable appliances, and copper wire for both personal use and resale. We simply conclude that a reasonable jury could have concluded that such activity does not qualify BWRI as a recycling company. The evidence shows that such activity, if it occurred, was sporadic at best. Further, the credibility of the main BWRI employee engaged in this practice, Bill Faulk, was significantly undermined as the Government elicited from the witness that he would personally haul, dump, and look through four to five loads of waste per day weighing anywhere from four to six tons and, thereafter, would remove any salvageable items from the rubble and transport those items to his house for storage.[10]

Finally, the Government presented the testimony of Larry Nobel, a driver for BWRI, who indicated that BWRI was not engaged in any recycling. This testimony is consistent with statements Faulk himself made to law enforcement officials and introduced into evidence wherein he indicated that BWRI was not engaged in recycling activities.[11] Furthermore, statements from Brian McKee to law enforcement officials were introduced into evidence wherein

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[10]To describe this testimony as incredulous would be an understatement. As one witness during the trial described, this practice, if it occurred, amounted to nothing more than "pilfering." We conclude that a reasonable jury could have determined that this practice does not constitute recycling.

[11]Out of concern for a possible *Bruton* violation, the district court instructed the jury on two separate occasions that Faulk's statements were to be considered solely against him.

he indicated that he knew what he was doing was illegal.[12] Thus, we conclude that a reasonable jury could conclude that BWRI was not a recycling company.[13] Therefore, we affirm Appellants' mail fraud convictions.[14]

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[12]Appellants Faulk, Williamson, and Jennifer McKee appeal the introduction of Brian McKee's statements to law enforcement as being admitted into evidence in violation of *Bruton*. The district court instructed the jury on two separate occasions that Brian McKee's statements were to be considered solely against him. As discussed below, we affirm the district court's admission of Brian McKee's statements into evidence.

[13]Because we conclude that a reasonable jury could conclude that BWRI was not a legitimate recycling company, we need not address in detail the evidence concerning whether BWRI was located within Etowah County. In summary, however, we conclude that a reasonable jury could conclude, as the Government argues, that BWRI's attempt to run an office out of Jennifer McKee's Etowah County house was a sham, was part of the conspiracy to defraud the ESWDA, and is further evidence of the Appellants' knowing and willful attempt to receive an $8.75 per ton dumping rate for which BWRI did not legitimately qualify.

[14]Unlike her codefendants, Jennifer McKee testified in her own defense. Thus, per our circuit precedent, the jury was free to disbelieve her and use her testimony as substantive evidence proving her guilt. *See United States v. Cotton*, 770 F.2d 940, 945 (11th Cir.1985) ("When a defendant takes the stand in a criminal case . . . the jury is free to disbelieve him and reject his explanation as a complete fabrication."); *United States v. Goggin*, 853 F.2d 843 (11th Cir.1988) (same); *see also, United States v. Allison*, 908 F.2d 1531 (11th Cir.1990) ("The jury may view the defendant's false explanatory statement as substantive evidence proving guilt.").

2. Money Laundering

Appellants Faulk, Williamson, and Brian McKee contend that the evidence is insufficient to sustain their convictions for money laundering and conspiracy to commit money laundering. To obtain a conviction on a substantive Section 1956(a)(1)(A)(I) promotional money laundering charge, the Government bears the burden of proving beyond a reasonable doubt that: (1) the defendant conducted or attempted to conduct a financial transaction; (2) the defendant knew the property involved in the transaction represented the proceeds of unlawful activity; (3) the property involved was in fact the proceeds of the specified unlawful activity; and (4) the defendant conducted the financial transaction "with the intent to promote the carrying on of [the] specified unlawful activity." 18 U.S.C. § 1956(a)(1)(A)(I). We find that all of these required elements have been satisfied.[15]

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[15]In their briefs, Appellants argue that the evidence is insufficient to constitute concealment and that the books and records of BWRI including all bank accounts were open, clean, and clear. However, concealment or an intent to conceal the nature or sources of the proceeds has no bearing in this case as it is not a required element of the offense for which Appellants were charged. Section 1956(a)(1) defines two separate money laundering offenses: those committed with the "intent to promote the carrying on of a specified unlawful activity," 18 U.S.C. § 1956(a)(1)(A)(I); and those committed with the intent "to conceal or disguise the nature, location, the source, the ownership, or the control of the proceeds of the specified unlawful activity," 18 U.S.C. § 1956(a)(1)(B)(I). While Count 19 alleges both money laundering offenses, at some point the Government appeared to abandon the concealment charge and focus exclusively on the promotional charge. Thus, in effect, Count 19 is in line with Counts 20-31 which allege only promotional money laundering.

The evidence amply demonstrates, as the Government contends, that bank deposits of proceeds of the fraudulent activity were made by Appellants and that such deposits were designed to convert the checks received from the mobile home manufacturers into cash in order to capitalize on the fraud perpetrated upon the ESWDA. Thus, the depositing and cashing of checks that represented the proceeds of the mail fraud promoted not only the Appellants' prior unlawful activity, but also their ongoing and future unlawful activity. Such evidence is sufficient to sustain a conviction for promotional money laundering. *See, e.g., United States v. Haun*, 90 F.3d 1096, 1100-01 (6th Cir.1996). Further, since the ultimate object of the conspiracy was to transfer the unearned dumping rate into cash, the financial transactions were in furtherance of the ongoing conspiracy offense and are sufficient to sustain Appellants' convictions. *See United States v. Carcione*, 272 F.3d 1297 (11th Cir.2001).

B. *Bruton*

Despite the efforts of defense counsel, Government counsel, and the district court, Faulk, Williamson, and Jennifer McKee contend that the admission of statements of Brian McKee, even in their redacted form, violate *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). At trial, the Government introduced through the testimony of Special Agent Keith Baker admissions of nontestifying codefendant Brian McKee wherein he indicated that "he was being paid because of his having gotten the recycling resolution passed and for giving Big Wheel the discounted rate of $8.75 a ton for dumping debris at the Etowah Solid Waste Disposal Authority." Faulk and Williamson argue that Brian McKee's statement facially implicates BWRI thus necessarily implicating them in violation of *Bruton.* Additionally, Special Agent Baker testified that Brian McKee stated that "money that came through Jennifer was his." Jennifer McKee argues that this facially implicates her in

violation of *Bruton*. For the following reasons we disagree and affirm the district court.

The Supreme Court held in *Bruton* that post-arrest statements made by nontestifying codefendants that facially incriminate other defendants are inadmissible into evidence because such statements violate the other defendants' Sixth Amendment rights to confront and cross-examine adverse witnesses. The Supreme Court concluded that "where the powerfully incriminating extra-judicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial," limiting instructions by the court will not suffice to eliminate the prejudicial effect of the introduction of such statements. *Bruton*, 391 U.S. at 135-36, 88 S.Ct. 1620. In *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), however, the Supreme Court had occasion to consider whether the confession of a nontestifying codefendant admitted during a joint trial that had been redacted to omit the names of all codefendants violated the rule established in *Bruton*. In that instance, the Court refused to apply *Bruton* and concluded that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with the proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Richardson*, 481 U.S. at 211, 107 S.Ct. 1702. The Court concluded that in such a situation, the confession is not so "powerfully incriminating" that a limiting instruction given by the district court could not effectively eliminate any prejudicial effect to the codefendants. *Id.* at 208, 107 S.Ct. 1702. The *Richardson* Court, however, "expressed no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Id.* at 211 n. 5, 107 S.Ct. 1702. That was an issue subsequently addressed by the Supreme Court in *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998).

In *Gray*, a confession written by a codefendant that explicitly referred to the defendant was redacted to eliminate any reference to the defendant. However, the defendant's name was replaced with the word "deleted" or was simply left as a blank space. *Gray*, 523 U.S. at 188, 118 S.Ct. 1151. When the Government's law enforcement witness read the codefendant's confession into evidence, he said "deleted" wherever the defendant's name had been redacted. The witness then testified that following the receipt of the codefendant's confession, he arrested the defendant. The Supreme Court concluded that the "obviously redacted confession" violated *Bruton* because it "pointed directly to the defendant." *Id.* at 194, 118 S.Ct. 1151. Thus, the Court concluded that the redacted confession "facially incriminated" the defendant and "involved inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." *Id.* In reaching this conclusion, the Court distinguished its decision in *Richardson* where the redacted confession "became incriminating 'only when linked with evidence introduced later at trial.' " *Id.* at 196, 118 S.Ct. 1151 (quoting *Richardson*, 481 U.S. at 208, 107 S.Ct. 1702).

We find that the *Bruton* question raised in this case is covered by *Richardson*. In *Richardson*, the Supreme Court clearly authorized the admission of a nontestifying codefendant's confession where such confession omitted reference to the defendant and was coupled with a limiting instruction. We fail to see how the statement of Brian McKee implicates, directly or otherwise, Faulk or Williamson. Faulk's and Williamson's arguments to the contrary are unavailing. Brian McKee's statement reflects only that he was paid to pass the recycling resolution and give BWRI a discounted dumping rate. The statement, as quoted above, does not facially implicate Faulk or Williamson as was the case with the confession the Supreme Court addressed in *Bruton*, nor was the statement "obviously redacted" as was the case in *Gray*. The statement itself is silent as to who paid Brian McKee.

Furthermore, even assuming that it is self-evident that BWRI was paying Brian McKee for passing the resolution and giving the discounted rate, naming BWRI does not facially implicate either Faulk or Williamson. In order to make that inferential link, additional, independent evidence is needed. Simply because the Government provided the jurors with the independent evidence needed to make that link does not create a *Bruton* violation.[16] What the Government accomplished in this case is what the Supreme Court specifically authorized in *Richardson.*

Brian McKee's statement concerning Jennifer McKee, however, does directly implicate her. However, Special Agent Baker's testimony on this point was a product of defense cross-examination wherein counsel for Faulk and Williamson asked Special Agent Baker:

> Q. Rather than claiming that Big Wheel paid him money, wasn't he really just saying that any money that Jennifer, his wife, got from Big Wheel, he claimed was his money? Isn't that basically the gist of what he was saying?
>
> A. He said money that came through Jennifer was his.

Because defense counsel received the very answer seemingly solicited, we are hard-pressed to conclude that a *Bruton* violation exists. Furthermore, counsel for Jennifer

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[16]By our conclusion, we do not mean to suggest that Brian McKee's statement did not potentially inculpate Faulk or Williamson. Rather, consistent with the Supreme Court's decision in *Richardson,* we simply conclude that the jury could follow the court's limiting instructions and limit the use of such statements to the proper defendant.

McKee did not object to the question or to the answer.[17] Because a timely objection was not interposed, we review the district court's admission of this evidence for plain error. *United States v. Foree*, 43 F.3d 1572 (11th Cir.1995).

As we held in *Foree*, to satisfy the plain error standard, "a party must demonstrate: (I) that there was an error in the lower court's action, (ii) that such error was plain, clear, or obvious, and (iii) that the error affected substantial rights, i.e. that it was prejudicial and not 'harmless.'" *Foree*, 43 F.3d at 1578 (citing *United States v. Olano*, 507 U.S. 725, 732-37, 113 S.Ct. 1770, 1777-79, 123 L.Ed.2d 508 (1993)). The defendant bears the burden of proving prejudice. *Id.* Finally, "even if all three of these prerequisites are fulfilled, the Courts of Appeals should correct such errors only when they 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *Id.* (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936)).

We conclude that none of the *Foree* plain error prongs have been satisfied. Simply put, the statement concerning Jennifer McKee was the product of defense cross-examination, the answer provided be Special Agent Baker was specifically tailored to the question asked, and the district court did not err in failing to intervene as counsel failed to object or in any way bring the alleged error to the attention of the district court. Thus, it is readily observable that any error, even if we were to presume its existence, was not plain, clear, or obvious. Finally, we conclude that Jennifer McKee failed to prove that the error was not harmless. First, the two limiting instructions

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[17]We recognize that Jennifer McKee joined in Faulk's and Williamson's objections to the Government's introduction of Brian McKee's statement. However, the material covered in this question and answer had not been presented by the Government.

given by the district court dissipated any prejudice to Jennifer McKee. Secondly, Jennifer McKee's testimony, with nothing more, clearly supports the jury's conclusion as to her guilt. Therefore, when the prejudicial effect of the admission of the statement is compared to the properly admitted evidence of Jennifer McKee's guilt, it appears clear that there is no reasonable probability that the improper statement contributed to the conviction. *Schneble v. Florida*, 405 U.S. 427, 432, 92 S.Ct. 1056, 1060, 31 L.Ed.2d 340 (1972).

III. CONCLUSION

After a thorough review of the record and consideration of the parties' briefs and oral argument, we conclude that there is sufficient evidence to sustain the convictions of Faulk, Williamson, and Brian and Jennifer McKee. Furthermore, we conclude that the district court did not err in admitting Brian McKee's statements. Rather, we commend the district court for taking the time to conduct an extensive *Bruton* hearing and for tailoring the admission of Brian McKee's statements so as to ensure a fair trial for all Defendants.[18]

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[18]The dissent would find a violation of due process as to Brian McKee. We respectfully disagree. This very experienced district judge stated in his order of January 4, 2002, that he had considered the recommendation of the United States Magistrate Judge and the objections filed by the defendant Brian McKee. He also stated that he made an independent review of the file and then made his rulings. We believe that he did exactly what he says he did. In our opinion, this is in accord with *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). We do not believe that there is any meaningful difference between the words "*de novo* determination" and "an independent review of the file." The ultimate decision was made by the district judge after

AFFIRMED.

DOWD, District Judge, concurring in part and dissenting in part:

Initially, I concur in the affirmance of the convictions and sentences of the appellants Dwight Faulk, Linda Williamson and Jennifer McKee. I respectfully dissent as to the affirmance with respect to appellant Brian McKee.

The centerpiece of the Government's case against Brian McKee was the recitation of his oral admission as offered by FBI Special Agent Keith Baker. Simply put, Agent Baker stated that Brian McKee told him "that he knew what he was doing was illegal" in the following testimony:

> Q. Sir, did you have an opportunity to conduct an interview of Brian McKee?
>
> A. Yes, I did.
>
> Q. Did Mr. McKee tell you that his address is 400 Bachelor Chapel Road, Gadsden, Alabama?
>
> A. He did.
>
> Q. Did he tell you that Big Wheel Recycling was formed in 1995 and it is a corporation?
>
> A. What year did you say, sir?
>
> Q. Formed in 1995.

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reviewing the entire file. This meets the due process requirements according to *Raddatz*.

A. That's correct.

Q. Did McKee tell you that he brought forward the resolution to allow recyclers to get a discounted rate at the Etowah Solid Waste Disposal Authority?

A. Yes, he did.

Q. Did McKee claim that he was being paid because of his having gotten the recycling resolution passed and for giving Big Wheel the discounted rate of $8.75 a ton for dumping debris at the Etowah Solid Waste Disposal Authority?

A. Yes, he did.

Q. When he was asked if the board members knew of the $8.75 a ton rate, did he tell you that he was never questioned about it by any of them?

A. He did.

Q. Did he tell you that he left the $17.50 per ton rate on the weight scale bills so the manufactured housing companies would not know about the $8.75 a ton rate?

A. He did.

Q. Did he tell you that CEI also got the $8.75 a ton rate, and they were not entitled to it?

A. That is correct.

> Q. Did he tell you that Sue Rogers did not know about the Big Wheel Recycling--did not know about Big Wheel Recycling when the 50 percent discount resolution was passed?
>
> A. That is correct.
>
> Q. Did Mr. McKee tell you that he knew what he was doing was illegal? A. Yes, he did.[1]

Tr., Vol. 20 of 29 at 154-55.

In advance of trial, on August 3, 2001, Brian McKee filed a motion to suppress his statements "of any nature obtained . . . by any and all investigative officers." In addition to raising a *Miranda* claim,[2] Brian McKee alleged that the statements "were involuntary" for several reasons: (1) because statements made by the investigating officers to the defendant were intentionally false and misleading; (2) because the defendant was exhausted due to the late hour and the fact that the interrogation was so long in duration, causing him to

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[1]The other appellants, Faulk, Williamson, and Jennifer McKee, all opposed the admission of Baker's testimony that Brian McKee had told Baker that McKee knew what he was doing was illegal as a violation of *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). I concur with my brethren that the admission of Brian McKee's testimony did not violate *Bruton*. My review of the record indicates that the Government only used the admission of "illegality" against Brian McKee. Moreover, the district court properly limited the jury's consideration of the admission to the Government's case against Brian McKee.

[2]*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

suffer from shock and emotional trauma based on his concern for his wife; (3) because of the attitude of the investigating officers toward the defendant; (4) because of promises made by the investigating officers to the defendant; and (5) because the defendant was coerced by the investigating officers into making these statements.

A second motion was also filed on August 3, 2001 and stated in part as follows:

> 5. The statements were involuntary because of statements made to the defendant by the investigating officers were intentionally false and misleading regarding their intentions concerning the interview.
>
> 6. That all statements and interviews were made because of promises made by the investigating officers to the defendant regarding their intentions to bring charges against this defendant and the wife of this defendant. *That the statements were involuntary in that the Government did not live up to their promises and therefore coerced the defendant into making these statements in hopes of gaining the reward which he was promised.* R.E. at 6 (emphasis added).

The Government filed a response on August 24, 2001 and replied to McKee's contention that the teachings of *Miranda* had been violated by demonstrating that McKee was never in custody during any of the three questioning sessions conducted on February 17, 2000, February 25, 2000, and March 14, 2001. Additionally, the Government pointed out that Brian McKee was accompanied by counsel for the interviews of

February 25, 2000 and March 14, 2001. However, the Government's response ignored the allegations of a coerced statement.

The evidentiary hearing in response to Brian McKee's motion to suppress his statements was conducted on November 19, 2001 before a magistrate judge. McKee testified that he had been promised that if he cooperated with the investigation, his wife would not be prosecuted. The Government did not present any testimony to rebut the McKee claim of an involuntary admission.

Magistrate Judge Walker's Report and Recommendation filed on December 14, 2001 addressed the issue of voluntariness as raised by Brian McKee and recommended a denial of his motion to suppress.

On December 27, 2001, Brian McKee's counsel filed very thorough objections[3] to the Report and Recommendation of Magistrate Judge Walker.

On January 4, 2002, the district court, after stating that "he engaged in an independent review of the file," denied the objections of Brian McKee entered on December 27, 2001.

The watershed case of *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), settled the dispute as to

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[3]The Report and Recommendation was filed on Friday, December 14, 2001. McKee's counsel is located in Gadsden, Alabama. He filed the objections on December 27. No claim was advanced that the objections were filed untimely. The record is inconclusive as to whether Brian McKee's counsel received the Report and Recommendation on December 14. Consequently, for the purpose of this dissent, I conclude that the objections of December 27 were timely filed.

whether a judge should submit the issue of voluntariness of a confession to the jury with instructions to ignore the confession if the jury found the confession to be involuntary. The Court held that the issue of voluntariness was to be decided in a pre-trial setting by the judge. If the confession was deemed involuntary, it was not to be submitted to the jury.

In this case, Brian McKee offered testimony on the issue of voluntariness. His testimony was not rebutted. In her recommendation, Magistrate Judge Walker opined that McKee's testimony was not credible and thus excused the lack of rebuttal by the Government.

The ruling in *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980), with respect to the use of magistrate judges to conduct suppression hearings in criminal cases in United States District Court proceedings, merits discussion. By a 5-4 vote, the Supreme Court determined that the district court did not have to hear anew the conflicting testimony heard by the assigned magistrate judge who conducted the suppression hearing.[4] The defendant testified that he had made incriminating statements at a meeting with Government agents only after "obtaining confirmation" from the agents of their earlier promise that the indictment against him would be dismissed if he cooperated. The agents testified at the suppression hearing and denied making the promise. Confronted with an issue of credibility, the magistrate judge filed a report which recommended that the defendant's motion be denied after stating: "I find the testimony of the Alcohol, Tobacco and Firearm Agents more credible . . . ; I find that Federal agents never advised [respondent] that charges against him would be dismissed, if he cooperated." The

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[4]In so ruling, the Supreme Court reversed the contrary decision in *United States v. Raddatz*, 592 F.2d 976 (7th Cir.1979).

Seventh Circuit had ruled that Raddatz had been deprived of due process by the procedure used and by the failure of the district court to rehear the testimony before accepting the recommendation of the magistrate judge. Nonetheless, the Supreme Court ruled that the due process rights of the defendant were protected by the Federal Magistrates Act because the district court acts as the ultimate decision maker on the defendant's suppression motion with broad discretion to accept, reject or modify the magistrate judge's proposed findings which include the discretion to hear the witnesses to resolve conflicting credibility claims. The majority held that the *de novo* determination of contested credibility assessments without personally rehearing the live testimony did not violate due process.

In the *Raddatz* decision, the majority opinion written by Chief Justice Burger described the actions of the district court after it received the magistrate's report as follows:

> Respondent filed objections to the Magistrate's report. In rendering its decision, the District Court stated that it considered the transcript of the hearing before the Magistrate on the motion to suppress, the parties' proposed findings of fact, conclusions of law, and supporting memoranda, and that it read the recommendation of the Magistrate and heard oral argument of counsel. Finding "that the three statements given by the defendant and sought to be suppressed were made voluntarily," the District Court accepted the recommendation of the Magistrate and denied the motion to suppress.

447 U.S. at 672, 100 S.Ct. 2406.

In the case at hand, the district court stated, in

response to the objections to the magistrate's report as it applied to the defendant Brian McKee's objections to the denial of the motion to suppress, simply that he made "an independent review of the file" and, based on that review, denied the motion. Contrary to *Raddatz*, there is no suggestion that the district court had considered the transcript of the testimony; there is no suggestion of a "*de novo* determination" of those portions of the magistrate's report, findings or recommendations to which the objections had been made, as required by 28 U.S.C. § 636(b)(1)(C). Furthermore, the absence of any suggestion of a *de novo* determination comes in a situation where, as pointed out by the magistrate and contrary to the conflicting testimony of the setting in *Raddatz*, the Government did not even bother to offer rebutting testimony to the testimony of Brian McKee.

Under the circumstances as above outlined, and accepting the teachings of *Raddatz*, it is my view that the due process rights of Brian McKee were violated in this case.[5] To

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[5]I find support in *Martinez v. Estelle*, 612 F.2d 173, 180 (5th Cir.1980), in which the Fifth Circuit found, after citing *Jackson v. Denno*, that "the record before us does not establish with 'unmistakable clarity' that the trial judge reliably determined the voluntariness of the confession. *Jackson v. Denno* has not been satisfied." *See also Jeffrey S. v. State Board of Education of State of Georgia*, 896 F.2d 507, 513 (11th Cir.1990) (criticizing failure to conduct the requisite *de novo* review where the district court "relied heavily upon the magistrate's assessment of the evidence and his judgment in drawing reasonable inferences therefrom."); *Stokes v. Singletary*, 952 F.2d 1567, 1576 (11th Cir.1992) (criticizing district court's failure "to accord a *de novo* review of the magistrate's factual findings"). The majority here seems to be setting up a new standard of review based on the length of experience of the district judge.

hold otherwise would be the equivalent of improperly delegating Article III powers.[6]

Consequently, I would reverse the conviction of Brian McKee, vacate his sentence, and remand for a new trial.

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[6]Although 28 U.S.C. § 636(b)(1)(B) permits a district judge to refer a motion to suppress to a magistrate judge for recommendations regarding disposition, § 636(b)(1)(C) "meticulously sets forth a *de novo* review procedure." *Gomez v. United States*, 490 U.S. 858, 874, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989) (holding that allowing a magistrate judge to conduct the *voir dire* for jury selection in a felony case was not harmless error, especially because it was "without any meaningful review by a district judge"). I doubt that the *Gomez* Court would find "meaningful" the cursory and unexplained "review of the file" conducted by the district court in the instant case.

FILED
U.S. COURT OF APPEALS
OCT 03 2003
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 02-12765-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LINDA WILLIAMSON,
a.k.a. Linda West,
DWIGHT FAULK,
JENNIFER MCKEE,
BRIAN MCKEE,

Defendants-Appellants.

On Appeal from the United States District Court for the
Middle District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S)
FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: DUBINA and FAY, Circuit Judges and DOWD*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

ORD-42
(12/01)

*Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT 21 2003
THOMAS K. KAHN

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12765-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LINDA WILLIAMSON,
a.k.a. Linda West,
DWIGHT FAULK,
JENNIFER MCKEE,
BRIAN MCKEE,

Defendants-Appellants.

On Appeal from the United States District Court for the
Middle District of Alabama

ORDER:

( ) The motion of Appellant, Jennifer McKee, for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of Appellant, Jennifer McKee, for (X) stay ( ) recall and stay of the issuance of the mandate

pending petition for writ of certiorari is GRANTED to and including *January 2, 2004*, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/
UNITED STATES CIRCUIT JUDGE

FILED
DEC. 3, 2001
CLERK
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

United States of America	)	
	)	
v.	)	**CR. NO. 01-106-N**
	)	
LINDA WILLIAMSON	)	
a/k/a LINDA WEST	)	

ORDER

It is ORDERED that the Government show cause, if any there be, in writing, by December 10, 2001, as to why defendant Linda Williamson's motion to excluded *Bruton* evidence, or in the alternative, motion *in limine*, filed August 2, 2001 (Doc. no 74), should not be granted.

DONE, this 3rd day of December, 2001.

/s/
MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 01-106-N
	)	
DWIGHT FAULK, et al.	)	

ORDER

Before the court are motions to sever by defendants Williamson, Faulk, Jennifer McKee and Brian McKee. *See* Doc. ##81, 82, 85 and 106; *see also* Doc. ##121, 125 (motions to supplement motions to sever). For the reasons set out *infra*, the court concludes that the motions to sever are due to be denied.

Discussion

Williamson and Faulk contend that their trial should be severed from Brian McKee's trial because (1) McKee's defense will be antagonistic to their defenses, and (2) McKee will need to be called and cross-examined in their case. Williamson and Faulk also maintain that their trial should be severed from that of Jennifer McKee because the latter must also be called as a witness. In their motions to supplement, Williamson and Faulk contend that the use of 404(b) evidence against Brian McKee in a joint trial will prejudice them.

Jennifer McKee argues that her trial should be severed from that of the other defendants under Fed.R.Crim.P. 8(b) and 14 on the ground: (1) that the indictment does not properly allege that McKee participated in the same acts or transactions with other defendants; and (2) that the other defendants, who may choose not to take the stand in a joint

trial, have made incriminating statements which may be offered against McKee without an opportunity for her to cross-examine.

Brian McKee asks that his trial be severed from that of the other defendants because "the discovery and documentation associated with each individual Defendant differs and in addition thereto there are various interviews and statements . . . that do not apply to each and every defendant," and because "each and every Exhibit, Interview, and Statement . . . would be objected to by at least one of the other Defendants on all occasions," which "would interfere with the trial process in that it would not allow the Jury to carefully consider the admissible evidence as to each Defendant in this cause."

I. Joint trial under Rule 14

Though the defendants, other than Jennifer McKee, do not specify the rules under which they move for severance, the court assumes that they seek severance pursuant to Federal Rule of Criminal Procedure 14.[1] The court concludes that Rule

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[1]Jennifer McKee – and possibly other defendants – also seek severance under Rule 8. "In contrast to a Rule 14 claim, which accepts that initial joinder is proper but asserts that a joint trial is prejudicial, a Rule 8(b) claim 'questions the propriety of joining two or more defendants in a single indictment in the first instance.'" *United States v. Wilson*, 894 F.2d 1245, 1252-53 (11th Cir. 1990)(citation omitted). The court examines only the allegations on the face of the indictment to determine whether joinder was proper under Rule 8(b). *Id.* at 1253. "'Rule 8 is broadly construed in favor to the initial joinder.'" *United States v. Dominguez*, 226 F.3d 1235, 1238 (11th Cir. 2000). Joinder is proper even if each participant is not involved in every phase of the venture, and each participant

14 severance is not warranted in this case.

"There is a preference in the federal system for joint trials of defendants who are indicted together." *United States v. Talley*, 109 F.3d 277, 279 (11th Cir. 1997). "The burden is on the defendant to 'demonstrate that a joint trial will result in specific and compelling prejudice to the conduct of his defense.'" *United States v. Schlei*, 1122 F.3d 944, 984 (11th Cir. 1997). "[U]ndocumented, conclusory allegations are insufficient to meet the defendant's burden and "to overcome [the] strong circuit preference favoring joint trials." *United States v. Smith*, 918 F.2d 1551, 1561 (11th Cir. 1990); *see also United States v. Wingate*, 997 F.2d 1429, 1431 (11th Cir. 1993) (conclusory allegations insufficient). Defendants' general and conclusory allegations that joint trial would be prejudicial or unfair to defendants do not meet defendants' burden. Further, because in most joint trials the evidence will implicate some participants to a greater extent than others, defendants fail to show compelling prejudice by showing some spillover of evidence. *United States v. Beale*, 921 F.2d 1412, 1428 (11th Cir. 1991). In this case the court has no reason to believe that the jury cannot independently evaluate the evidence against each defendant, follow the court's limiting instructions when appropriate, and arrive at an individualized determination as to each defendant. Defendants have not established otherwise.

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does not know of the other participants' roles and identities. *Wilson*, 894 F.2d at 1253. Upon careful review of the indictment in this case, the court is satisfied that the acts alleged are sufficiently united by a substantial identity of facts and/or participants so as to make initial joinder proper under Rule 8(b).

II. Exculpatory testimony of co-defendants

In addition to their general contentions that severance is appropriate, Williamson and Faulk appear to ask the court to separate their trials from those of the other defendants on the ground that co-defendants Brian and Jennifer McKee will take the stand and give testimony on their behalf only if severance is granted.

In this circuit, to obtain a severance based upon the exculpatory testimony of a co-defendant, defendants must show: "(1) a bona fide need for the testimony; (2) the substance of the desired testimony; (3) the exculpatory nature and effect of the desired testimony; and (4) that the co-defendant would indeed have testified at a separate trial." *United States v. Funt*, 894 F. 2d 1288, 1297 (11th Cir. 1990); *see also United States v. Adams*, 1 F.3 1566, 1579 (11th Cir. 1993). Even if defendants make this facial showing, "'the district court must then (1) examine the significance of the testimony in relation to the defendant's theory of the defense, (2) assess the extent of prejudice caused by the absence of the testimony, (3) pay close attention to judicial administration and economy, and (4) give weight to the timeliness of the motion.'" *United States v. Harris*, 908 F.2d 728, 739 (11th Cir. 1990) (citation omitted).

The motions of Williamson and Faulk do not make the necessary facial showing, as they fail to discuss the bona fide need for the testimony, explain the substance of the desired testimony, specifically address the exculpatory nature and effect of the desired testimony, and establish that the co-defendant would indeed have testified at a separate trial. No affidavits from co-defendants have been filed in support of the motions. *See United States v. Wingate*, 997 F.2d 1429, 1432 n. 6 (11th Cir. 1993) (Defendant's failure to support motion to sever with affidavits tending to suggest that a co-defendant possessed and was willing to share any exculpatory evidence

was fatal to the motion); *see also United States v. Beale*, 921 F.2d 1412, 1428-29 (Requiring affidavit from co-defendant stating the exact substance of his proffered testimony and the fact that he had actually agreed to testify). The court has no basis on which it may conclude that any co-defendant is willing to offer exculpatory testimony at Williamson's or Faulk's trials if severance is granted and, thus, the motion is due to be denied.

III. *Bruton* Evidence

Jennifer McKee also asks the court to sever her trial on the ground that her co-defendants have given statements to law enforcement, and their trials must be severed from hers to prevent the introduction of any incriminating statement by a non-testifying co-defendant in a joint trial in violation of defendants' Sixth Amendment rights to confrontation and cross-examination of witnesses under *Bruton v. United States*, 391 U.S. 123 (1968).

In *Bruton*, the Supreme Court held that "a defendant is deprived of his Sixth Amendment right of confrontation when the facially incrimination confession of a non-testifying co-defendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the co-defendant." *Richardson v. Marsh*, 481 U.S.200, 208 (1987). *Richardson*, a subsequent Supreme Court case, held that when a statement is not incriminating on its face, but becomes so only when linked with evidence introduced later at trial, the statement need not be excluded provided it is redacted to eliminate not only the defendant's name, but also any reference to his or her existence, and the jury is given a proper limiting instruction. *Id.* at 211; *see also Gray v. Maryland*, 523 U.S. 185 (1998) (redacted confession that refers directly to the existence of the non-confessing co-defendant comes within the *Bruton* rule).

The *Bruton* argument offered by McKee in her motion

to sever is brief and general in nature, and she has not specifically pointed out which statements of co-defendants she contends are facially incriminating. In its response to defendants' motions to sever (Doc. # 136), the Government maintains that it "is familiar with the Supreme Court's holding in *Bruton* and has no intention of offering evidence that would violate the rule set forth in *Bruton*." Under these circumstances, the court cannot at this stage conclude that *Bruton* compels severance in this case.

IV. Antagonistic Defenses

Williamson and Faulk contend that their trial should be severed from Brian McKee's trial because McKee's defense will be antagonistic to their defenses.

Mutually antagonistic defenses are not prejudicial per se. *Zafiro v. United States*, 506 U.S. 534, 538 (1993). The fact that defendant may have a better chance at acquittal if tried separately does not alone entitle him or her to severance. *Id.* at 540. In *Zafiro*, the Court held that, when defendants have been joined properly under Rule 8(b), the district court should grant Rule 14 severance only if (1) there exists "a serious risk that a joint trial would compromise a specific trial right of one of the defendants," or (2) a joint trial would "prevent the jury from making a reliable judgement about guilt or innocence." *United States v. Talley*, 108 F.3d 277, 280 (11th Cir. 1997) (quoting *Zafiro*, 506 U.S. at 539). Mutually antagonistic defenses do not justify severance unless "the essence of one defendant's defense [is] contradicted by a co-defendant's defense. . . ." *United States v. Cassano*, 132 F.3d 646, 652 (11th Cir. 1998) (citation and internal quotation marks omitted). "To warrant severance, defenses must be antagonistic to the point of being irreconcilable or mutually exclusive." *Id.* (citation and internal quotation marks omitted). In *Zafiro*, the Court specifically recognized that limiting instructions "often will suffice to cure any risk of prejudice." *Talley*, 108 F.3d at 280.

In the instant case, Williamson and Faulk do not indicate how their defenses are antagonistic to or irreconcilable with those of the other defendants, nor do they establish that there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or show that a joint trial would prevent the jury from making a reliable judgment about guilt or innocence. The court has no basis on which to conclude that appropriate limiting instructions will not cure any risk of prejudice from a conflict among the defenses offered in a joint trial, if any such conflict occurs. Defendants' requests for severance are without merit.

V. Conclusion

For the foregoing reasons, it is

ORDERED that defendants' motions to supplement are GRANTED (Doc. ##121, 125), and the motions to sever, as supplemented (Doc. ##81, 82, 85 and 106) are DENIED.

DONE this 6th day of December, 2001.

/s/
SUSAN RUSS WALKER
UNITED STATES MAGISTRATE JUDGE

FILED
DEC 11 2001
CLERK
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	**CR. NO. 01-106-N**
	)	
DWIGHT FAULK, et al.	)	

ORDER

For good cause, it is

ORDERED that the order (Doc. # 173) entered on December 6, 2001 be and hereby is VACATED.

DONE this 11th day of December, 2001.

/s/
SUSAN RUSS WALKER
UNITED STATES MAGISTRATE JUDGE

FILED
DEC 11 2001
CLERK
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR NO. 01-106-N
	)	
DWIGHT FAULK, et al.	)	

ORDER AND RECOMMENDATION OF THE MAGISTRATE JUDGE

Before the court are motions, to sever by defendants Williamson, Faulk, Jennifer McKee and Brian McKee. *See* Doc. ## 81, 82, 85 and 106; *see also* Doc. ## 121, 125 (motions to supplement motions to sever). For the reasons set out *infra*, the court concludes that the motions to sever are due to be denied.

Discussion

Williamson and Faulk contend that their trial should be severed from Brian McKee's trial because (1) McKee's defense will be antagonistic to their defenses, and (2) McKee will need to be called and cross-examined in their case. Williamson and Faulk also maintain that their trial should be severed from that of Jennifer McKee because the latter must also be called as a witness. In their motions to supplement, Williamson and Faulk contend that the use of 404(b) evidence against Brian McKee in a joint trial will prejudice them.

Jennifer McKee argues that her trial should be severed from that of the other defendants under Fed.RCrim.P. 8(b) and 14 on the ground: (1) that the indictment does' not properly allege that McKee participated in the same acts or transactions with other defendants; and (2) that the other defendants, who may choose not to take the stand in a joint trial, have made incriminating statements which may be offered against McKee without an opportunity for her to cross-examine.

Brian McKee asks that his trial be severed from that of the other defendants because "the discovery and documentation associated with each individual Defendant differs and in addition thereto there are various interviews and statements . . . that do not apply to each and every defendant," and because "each and every Exhibit, Interview, and Statement . . . would be objected to by at least one of the other Defendants on all occasions," which "would interfere with the trial process in that it would not allow the fury to carefully consider the admissible evidence as to each Defendant in this cause."

I. Joint trial under Rule 14

Though the defendants, other than Jennifer McKee, do not specify the rules under which they move for severance, the court assumes that they seek severance pursuant to Federal Rule of Criminal Procedure 14.[1] The court concludes that Rule

---

[1]Jennifer McKee – and possible other defendants – also seek severance under Rule 8. "In contrast to a Rule 14 claim, which accepts that initial joinder is proper but asserts that a joint trial is prejudicial, a Rule 8(b) claim 'questions the propriety of joining two or more defendants in a single indictment in the first instance.'" *United States v. Wilson*, 894 F.2d 1245, 1252-53 (11th Cir. 1990) (citation omitted). The court examines only the allegations on the face of the indictment to

14 severance is not warranted in this case.

"There is a preference in the federal system for joint trials of defendants who are indicted together." *United States v. Talley*, 109 F.3d 277, 279 (11th Cir. 1997). "The burden is on the defendant to 'demonstrate that a joint trial will result in specific and compelling prejudice to the conduct of his defense.'" *United States v. Schlei*, 1 122 F.3d 944, 984 (11th Cir. 1997). "(Undocumented, conclusory allegations are insufficient to meet the defendant's burden and "to overcome [the] strong circuit preference favoring joint trials." *United States v. Smith*, 918 F.2d 1551, 1561 (11th Cir. 1990); *see also United States v. Wingate*, 997 F.2d 1429, 1431 (11th Cir. 1993) (conclusory allegations insufficient). Defendants' general and conclusory allegations that joint "al would be prejudicial or unfair to defendants do not meet defendants' burden. Further, because inmost joint trials the evidence will implicate some participants to a greater extent than others, defendants fail to show compelling prejudice by showing some spillover of evidence. *United States v. Beale*, 921 F.2d 1412, 1428 (11" Cir. 1991). In this case the court has n reason to believe that the jury cannot independently evaluate the evidence against each defendant, follow the court's limiting instructions when appropriate, and arrive at an individualized determination

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determine whether joinder was proper under Rule 8(b). *Id.* at 1253. "'Rule 8 is broadly construed in favor of the initial order.'" *United States v. Dominguez*, 226 F.3d 1235, 1238 (11th Cir. 2000). Joinder is proper even if each participant is not involved in every phase of the venture, and each participant does not know f the other participants' roles and identities. *Wilson*, 894 F.2d at 1253. Upon careful review of the indictment in this case, the court is satisfied that the acts alleged are sufficiently united by a substantial identity of facts and/or participants so as to make initial joinder proper under Rule 8(b).

each defendant. Defendants have not established otherwise.

II. Exculpatory testimony of co-defendants.

In addition to their general contentions that severance is appropriate, Williamson and Faulk appear to ask the court to separate their trials from those of the other defendants on the ground that co-defendants Brian and Jennifer McKee will take the stand and give testimony of their behalf only if severance is granted.

In this circuit, to obtain a severance based upon the exculpatory testimony of a codefendant, defendants must show: "(1) a bona fide need for the testimony; (2) the substance of the desired testimony; (3) the exculpatory nature and effect of the desired testimony; and (4) that the co-defendant would indeed have testified at a separate trial." *United States v. Funt*, 896 F. 2d 1288, 1297 (11 th Cir. 1990); *see also* United *States v. Adams*, I F.3d 1566, 1579 (11 th Cir. 1993). Even if defendants make this facial showing, "'the district court must then (1) examine the significance of the testimony in relation to the defendant's theory of the defense, (2) assess the extent of prejudice caused by the absence of the testimony, (3) pay close attention to judicial administration and economy, and (4) give weight to the timeliness of the motion.'" United *States v. Harris*, 908 F.2d 728, 739 (11 th Cir. 1990) (citation omitted).

The motions of Williamson and Faulk do not make the necessary facial showing, as they fail to discuss the bona fide need for the testimony, explain the substance of the desired testimony, specifically address the exculpatory nature and effect of the desired testimony, and establish that the co-defendant would indeed have testified at separate trial. No affidavits from co-defendants have been filed in support of the motions. *See United States v. Wingate*, 997 F.2d 1429, 1432 n. 6 11th Cir. 1993) (Defendant's failure to support motion to sever with affidavits tending to suggest that a co-defendant

possessed and was willing to share any exculpatory evidence was fatal to the motion); *see also United States. v. Beale*, 921 F.2d 1412, 1428-29 (Requiring affidavit from co-defendant stating the exact substance of his proffered testimony and the fact that he had actually agreed to testify). The court has no basis on which it may conclude that any co-defendant is willing to offer exculpatory testimony at Williamson's or Faulk's trials if severance is granted and, thus, the motion is due to be denied.

III. *Bruton* Evidence

Jennifer McKee also asks the court to sever her trial on the ground that her codefendants have given statements to law enforcement, and their trials must be severed from hers to prevent the introduction of any incriminating statement by a non-testifying codefen*dan*t in a joint trial in violation of defendants' Sixth Amendment rights to confrontation and cross-examination of witnesses under *Bruton v. United States*, 391 U.S. 123 (1968).

In *Bruton*, the Supreme Court held that "a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a non-testifying co-defendant introduced is introduced at their joint trial, even if the jury is instructed to consider the confession only against the co-defendant." *Richardson v. Marsh*, 481 U.S. 200, 208 (1987). *Richardson*, a subsequent Supreme Court ease, held that when a statement is not incriminating on its face, but becomes so only when linked with evidence introduced later at trial, the statement, need not be excluded provided it is redacted to eliminate nor only the defendant's name, but also any reference to his or her existence, and the jury is given a proper limiting instruction. *Id.* at 211; *see also Gray v. Maryland*, 523 U.S. 185 (1998) (redacted confession that refers directly to the existence of the non-confessing codefendant comes within *Bruton* rule).

The *Bruton* argument offered by McKee in her motion to sever is brief and general in nature, and she has not specifically pointed out which statements of co-defendants she contends are facially incriminating. In its response to defendants' motions to sever (Doc. # 136), the Government maintains that it "is familiar with the Supreme Court's holding in *Bruton* and has no intention of offering evidence that would violate the rule set forth in *Bruton*." Under these circumstances, the court cannot at this stage conclude that *Bruton* compels severance in this case.

IV. Antagonistic Defenses

Williamson and Faulk contend that their trial should be severed foci Brian McKee's trial because McKee's defense will be antagonistic to their defenses.

Mutually antagonistic defenses are not prejudicial per se. *Zafiro v. United* States, 506 U.S. 534, 538 (1993). The fact that defendant may have a better chance at acquittal if tried separately does not alone entitle him or her to severance. *Id.* at 540. In *Zafiro,* the Court held that, when defendants have been joined properly under Rule 8(b), the district court should grant Rule 14 severance only if (1) there exists "a serious risk that a joint trial would compromise a specific trial right of one of the defendants," or (2) a joint trial would "prevent the jury from making a reliable judgment about guilt or innocence." *United States v. Talley,* 108 F.3d 277, 280 (11th Cir. 1997) (quoting *Zafiro,* 506 U.S. at 539). Mutually antagonistic defenses do not justify severance unless "the essence of one defendant's defense [is] contradicted by a co-defendant's defense. . . . " *United States v. Cassano,* 132 F.3d 646, 652 (filth Cir. 1998) (citation and internal quotation marks omitted). "To warrant severance, defenses must be antagonistic to the point of being irreconcilable or mutually exclusive." *Id.* (citation and internal quotation marks omitted). In *Zafiro,* the Court specifically recognized that limiting instructions "often will suffice to cure

any risk of prejudice." *Talley*, 108 F.3d at 280.

In the instant case, Williamson and Faulk do not indicate how their defenses are antagonistic to or irreconcilable with those of the other defendants, nor do they establish that there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or show that a joint trial would prevent the jury from making a reliable judgment about guilt or innocence. The court has no basis on which to conclude that appropriate limiting instructions will not cure any risk of prejudice from a conflict among the defenses offered in a joint trial, if any such conflict occurs. Defendants' requests for severance are without merit.

V. Conclusion

For the foregoing reasons, it is

ORDERED that defendants' motions to supplement are GRANTED (Doc. ## 121, 125). Further, it is the RECOMMENDATION of the Magistrate Judge that the motions to sever, as supplemented (Doc. ## 81, 82, 85 and 106), be DENIED.

DONE this 11th day of December, 2001.

/s/
SUSAN RUSS WALKER
UNITED STATES MAGISTRATE JUDGE

ORDER

The Clerk of the Court is ORDERED to file the Recommendation of the Magistrate Judge and to serve by mail a copy thereof on the parties to this action. The parties are DIRECTED to file any objections to the said Recommendation within a period of thirteen days from the date of mailing to them. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive or general objections will not be considered by the District Court.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a de novo determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds plain grounds the adopted of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982). *See Stein v. Reynolds Securities. Inc.*, 667 F.2d 33 (11th Cir. 1982). *See also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981, *en banc*), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 31, 1981.

DONE this 11th day of December, 2001.

/s/
SUSAN RUSS WALKER
UNITED STATES MAGISTRATE JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 01-106-N
	)	
DWIGHT FAULK, BRIAN MCKEE,	)	
JENNIFER MCKEE, and	)	
LINDA WILLIAMSON	)	

ORDER

Upon consideration of the recommendation of the United States Magistrate Judge, entered on December 10, 2001 (Doc. no. 182), to which no objection has been filed, and after an independent review of the file, it is ORDERED as follows:

(1) The recommendation of the United States Magistrate Judge, entered on December 11, 2001 (Doc. no. 182), is adopted.

(2) The following motions, as supplemented, are denied: motion to sever, filed by defendant Linda Wi11iamson on August 3, 2001 (Doc. no. 81) ; motion to sever, filed by defendant Dwight Faulk on August 3, 2001 (Doc. no. 82); motion to sever, filed by defendant Jennifer McKee on August 3, 2001 (Doc. no. 85) ; and motion to sever, filed by defendant Brian McKee on August 3, 2001 (Doc. no. 106).

DONE, this the 3rd day of January, 2002.

/s/
MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

FILED
JAN 11 2002
CLERK
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CR. NO. 01-106-N
	)	
DWIGHT FAULK, BRIAN MCKEE, and LINDA WILLIAMSON	)	

ORDER

The court has considered the recommendation of the United States Magistrate Judge, entered on December 10, 2001 (Doc. no. 178), and the objections filed by defendant Brian McKee on December 27, 2001 (Doc. no. 193), and defendant Dwight Faulk on December 20, 2001 (Doc. no. 190), and has made an independent review of the file. Accordingly, it is ORDERED as follows:

(1) The recommendation of the United States Magistrate Judge, entered on December 10, 2001 (Doc. no. 178), is adopted.

(2) The following motions are denied: motion for leave of court to file motion to supplement, filed by defendant Dwight Faulk on November 30, 2001 (Doc. no 165); motion to supplement, filed by defendant Dwight Faulk on November 30, 2001 (Doc. no. 166); motion for leave of court to file motion to supplement, filed by defendant Linda Williamson on

November 30, 2001 (Doc. no. 167); motion to supplement, filed by defendant Linda Williamson on November 30, 2001 (Doc. no. 168); motion for leave of court to file motion to supplement, filed by defendant Brian McKee on December 6, 2001 (Doc. no. 174); and motion to supplement, filed by defendant Brian McKee on December 6, 2001 (Doc. no. 175).

DONE, this the 11th day of January, 2002.

/s/
MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

FILED
MAY 22 2002
CLERK
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA..

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CR. NO. 01-106-N
	)	
BRIAN MCKEE, DWIGHT FAULK, JENNIFER MCKEE, and LINDA WILLIAMSON a/k/a LINDA WEST)	)	

SUPPLEMENTAL OPINION

During argument before the court on the question of whether the defendants should be released pending appeal, counsel for defendants Dwight Faulk and Linda Williamson again cited *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968), for the proposition that a defendant is deprived of his rights under the confrontation clause when his nontestifying co-defendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the co-defendant. However, counsel failed, as he repeatedly did throughout the trial, to note that *Bruton's* reach was later limited by the Supreme Court in the case of *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702 (1987), where the Court expressly held that there is no *Bruton* violation (1) by the admission of a non-testifying codefendant's confession (2) with a proper limiting instruction (3) when the confession is redacted to eliminate reference to the defendant and (4) even

though the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial. And this is true even though the confession, in the words of both the *Marsh* majority and dissenters, is "powerfully incriminating," *id.* at 206, 107 S.Ct. at 1706 (Scalia, J, majority opinion); *id.* at 214, 107 S.Ct. at 1711 (Stevens, J, dissenting), and, as the dissenters critically described, the incriminating inference to be drawn from the linking evidence is "certain." *Id.* at 215, 107 S.Ct. at 1711 (Stevens, J, dissenting).

The Court explained that where "the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial, . . . it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." *Id.* at 208, 107 S.Ct. at 1707-1708. The Court further explained as follows:

> "Even more significantly, evidence requiring linkage differs from evidence incriminating on its face in the practical effects which application of the *Bruton* exception would produce. If limited to facially incriminating confessions, *Bruton* can be complied with by redaction—a possibility suggested in that opinion itself. *Id.*, at 134, n. 10, 88 3.Ct., at 1626, n.10. If extended to confessions incriminating by connection, not only is that not possible, but it is not even possible to predict the admissibility of a confession in advance of trial. The contextual implication' doctrine articulated by the Court of Appeals would presumably require the trial judge to assess at the end of each trial whether, in light of all of the evidence, a nontestifying codefendant's confession has been so 'powerfully incriminating' that a new, separate trial is required for the defendant. This obviously

lends itself to manipulation by the defense—and even without manipulation will result in numerous mistrials and appeals. It might be suggested that those consequences could be reduced by conducting a pretrial hearing at which prosecution and defense would reveal the evidence they plan to introduce, enabling the court to assess compliance with *Bruton ex ante* rather than *ex post*. If this approach is even feasible under the Federal Rules (which is doubtful—*see, e.g.*, Fed.RuleCrim.Proc. 14), it would be time consuming and obviously far from foolproof. One might say, of course, that a certain way of assuring compliance would be to try defendants separately whenever an incriminating statement of one of them is sought to be used. That is not as facile or as just a remedy as might seem. Joint trials play a vital role in the criminal justice system, *accounting* for almost one third of federal criminal trials in the past five years. . . . Many joint trials—for example, those involving large conspiracies to import and distribute illegal drugs—involve a dozen or more codefendants. Confessions by one or more of the defendants are commonplace—-and indeed the probability of confession increases with the number of participants, since each has reduced assurance that he will be protected, by his own silence. It would impair both the efficiency *and* the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the

> inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts. The other way of assuring compliance with an expansive *Bruton* rule would be to forgo use of codefendant confessions. That price also is too high, since confessions 'are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.' *Moran v. Burbine*, 475 U.S. 412, 426, 106 S.Ct. 1135, 1143, 89 L.Ed.2d 410 (1986) (citation omitted)."

Id. at 208-210, 107 S.Ct. at 1708-1709 (citations omitted).

DONE, this the 22nd day of May, 2002.

/s/
MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE